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No. 97-1610

In the Supreme Court of the United States

OCTOBER TERM, 1997

BUNKER GROUP, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in ruling that the concursus procedure under Rule F of the Supplemental Rules For Certain Admiralty and Maritime Cases does not apply to claims brought under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 132 F.3d 818. The order of the district court (Pet. App. B1-B5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 1997. The petition for a writ of certiorari was filed on March 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that the court of appeals was incorrect in ruling that the admiralty "concursus" procedure, Rule F of the Supplemental Rules For Certain Admiralty and Maritime Claims (Rule F),

does not apply in cases brought pursuant to the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* (OPA).

1. a. The Limitation of Shipowner's Liability Act of 1851 (Limitation Act), 46 U.S.C. App. 181-196, allows a shipowner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Paragraph (1) of Rule F provides that, within six months of receiving a claim in writing, "any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute." Paragraph (2) of Rule F provides that "[t]he complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited." If the vessel owner complies with the requirements for timely filing of a complaint, "all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease." Rule F(3). The court then has the authority to issue notice to all claimants with respect to which the vessel owner seeks limitation of liability, Rule F(4), to require the filing of claims in a single consolidated procedure, Rule F(5), and, upon determining the vessel owner's liability, to award pro rata shares to the claimants "in proportion to the amounts of their respective claims," Rule F(8). The procedure provides a "concursus" of all claims against the vessel owner arising out of claims consistent with limitations on vessel owner liability provided by statute.

b. In 1990, Congress enacted the OPA. That legislation followed the catastrophic marine and environ-

mental disaster involving the *Exxon Valdez*, which discharged more than 11 million gallons of crude oil into Prince William Sound, Alaska. The OPA provides a comprehensive liability scheme for oil spills, applying to cases arising from such accidents, "[n]otwithstanding any other provision or rule of law." 33 U.S.C. 2702(a). Under the OPA, "each responsible party for a vessel or a facility from which oil is discharged * * * is liable for the removal costs and damages." 33 U.S.C. 2702(a). Included in the definition of "responsible party" are vessel owners, operators, and demise charterers. 33 U.S.C. 2701(32)(A).

In addition to changing the parties liable for oil spill damages, the OPA also abandons the Limitation Act's value-of-the-vessel-plus-pending-freight liability formula. "[T]he OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels and $.5 million for all other vessels. 33 U.S.C. §§ 2702, 2704. Moreover, in certain instances, the OPA imposes virtually unlimited liability on the responsible party. *See* 33 U.S.C. § 2704(c)." Pet. App. A9. Moreover, the OPA liability provisions do not affect the imposition of additional liability under "State law, including common law." 33 U.S.C. 2718(a)(2).

2. On January 7, 1994, the tow line connecting the tug *M/V Emily S* and the tank barge *Morris J. Berman* parted. The tank barge grounded off the coast of San Juan, Puerto Rico, causing a large oil spill. Pet. App. A3. On January 8, 1994, the Commonwealth of Puerto Rico filed suit in the District of Puerto Rico federal court under the OPA, general maritime law, and Puerto Rico law to recover economic losses and natural resource damages. Thereafter, the owners, operators, and charterers of the tug and the barge

filed complaints for exoneration from, or limitation of, liability under the Limitation Act and Rule F. *Id.* at A3.[1]

On August 25, 1994, the district court issued a monition order, setting a deadline of October 15, 1994, for claimants to file their claims in the Limitation Act cases. Pet. App. A4. The United States and the Commonwealth of Puerto Rico both filed protective claims in the Limitation Act cases to recover their respective damages resulting from the oil spill, including claims based on the OPA. Hilton International of Puerto Rico, Inc. (Hilton), Hotel Development Corporation (HDC), and Puerto Rico Tourism Company (Tourism) each filed their respective claims in the two limitation cases under seal. *Id.* at A4-A5.

On October 17, 1994, Hilton and HDC filed a "Joint Motion to Amend Order and Notice; To Stay Proceedings; Or In The Alternative, To Relax The Monition Period, And Memorandum of Law." On the same day, Tourism and HDC jointly filed a "Petition For Dismissal Or Stay Of Proceedings." C.A. App. A189, A211. In those motions, Hilton, HDC, and Tourism sought relief from the monition and injunction so that they could pursue their respective OPA claims administratively before the National Pollution Funds Center (NPFC), which administers the Oil Spill Liability Trust Fund (OSLTF), and thereby not be

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[1] The Bunker Group, Inc. (BGI), Bunker Group Puerto Rico, Inc. (BGPR) and New England Marine Services, Inc. (NEMS), collectively referred to as the "Bunker Group," were the plaintiffs in that action brought pursuant to Rule F of the Supplemental Admiralty Rules. MetLife Capital Corporation (MetLife), the owner of the tug, filed a separate Limitation Act action, but has not sought further review of the court of appeals' decision.

forced into litigation prior to the NPFC's review of their claims. In response to those motions, the United States and the Commonwealth each filed briefs arguing that the OPA claims are not subject to the Limitation Act and the procedures of Rule F, and that those claims may be asserted independently of the limitation proceedings. *Id.* at A60 (Docket No. 230); A211. Limitation plaintiffs MetLife and Bunker Group responded to those motions by arguing that OPA claims are subject to the Limitation Act and Rule F concursus. *Id.* at A57 (Docket Nos. 193, 195).

On June 28, 1996, the district court issued an order holding that the OPA claims are not subject to the Limitation Act or Rule F concursus. Pet. App. B1-B5.[2]

3. The court of appeals affirmed (Pet. App. A1-A13), holding that the OPA partially repealed the Limitations Act; and to the extent that the Limitations Act no longer applied to oil spill cases, "the procedural rules incorporated into the Limitation Act are inapplicable as well." *Id.* at A8.

The court of appeals acknowledged the judicial reluctance to find a repeal by implication. Pet. App. A9 (citing *TVA* v. *Hill*, 437 U.S. 153, 189 (1978)). It nonetheless observed that the OPA contains a num-

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[2] Following the issuance of that order, Hilton withdrew its sealed limitation claim to proceed administratively before the NPFC. C.A. App. A80 (Docket No. 363). On January 7, 1997, the United States filed an independent action under the OPA against the vessel owners, operators, charterers and various other parties. The Commonwealth, having sued in parens patriae on behalf of a number of Puerto Rico agencies, subsequently assumed the claims of HDC and Tourism in its Third Amended Complaint.

ber of provisions expressly repealing provisions of the Limitation Act in the context of oil spills (*id.* at A8):

> In addition to the "notwithstanding" clause, at least four other provisions in the statute explicitly repeal the Limitation Act with respect to certain types of claims. *See* 33 U.S.C. §§ 2702(d)(1)(A) (repealing the Limitation Act as to third parties solely responsible for a spill); 2718(a) (repealing the Limitation Act as to state and local statutory remedies); 2718(c)(1) (repealing the Limitation Act as to additional liability imposed by the United States, any state, or political subdivision); 2718(c)(2) (repealing the Limitation Act as to fines and penalties).

In addition, the court of appeals found that "several key provisions of the two statutes are plainly inconsistent." *Id.* at A9. The court of appeals noted that the liability schemes of the two statutes differ: "the Limitation Act limits the shipowner's liability to the post-accident value of the vessel plus pending freight, 46 U.S.C. § 183, while the OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels" and "virtually unlimited liability on the responsible party" in certain circumstances. *Ibid.* (citing 33 U.S.C. 2702 and 2704). Moreover, "the provisions on jurisdiction are in obvious tension"; whereas only the federal courts may entertain Limitation Act suits, both federal and state courts have jurisdiction to adjudicate oil spill cases. *Ibid.*

In the court of appeals, petitioners had argued that, even if the OPA supersedes the Limitation Act, nothing in the OPA precludes a concursus as provided under Rule F. The court of appeals rejected that

contention, finding the provisions of Rule F to be incompatible with litigation brought under the OPA. Pet. App. A11-A13. With respect to venue, the court compared Rule F with the OPA. *Id.* at A11. Rule F(9) permits a limitation action to be brought only in the district where the vessel has been seized; or, if the vessel has not been seized, where the owner has been sued; or, in the absence of vessel seizure or suit, where the vessel is located; "but, if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district." Under the OPA, venue will simultaneously lie in any district where the discharge occurred; where damages were incurred; or where the defendant resides (or may be found), has its principal office, or has a registered agent for service of process. 33 U.S.C. 2717(b). "Thus, the OPA offers claimants a much broader choice of forums while Rule F's venue requirements are significantly more restrictive." Pet. App. A11-A12.

The court of appeals similarly found the time limitations for filing claims under Rule F to be incompatible with the OPA. Under Rule F(4), the district court may use its discretion to cut off claims, so long as claimants are given at least thirty days from the monition notices. OPA, however, gives claimants three years to commence an action to recover removal costs and damages from a responsible party, or six years to seek recovery against the OSLTF. *Id.* at A12 (citing 33 U.S.C. 2712, 2717). The court expressed particular "concern" that "the shortened claims period under Rule F * * * would interfere with the United States' subrogation rights under the OPA." *Ibid.* The court reasoned that those time limitations would potentially cause the United States

to "be denied access to the proceedings against the responsible party, and consequently, the Fund will bear the financial burden of these late claims." *Ibid.*

Finally, the court of appeals found that the concursus provision in Rule F(3) was inconsistent with the OPA procedures. Under OPA, the court of appeals observed that (Pet. App. A13):

> all claims for removal costs or damages [must] be presented first to the responsible party or guarantor. *See* 33 U.S.C. § 2713(a). If the responsible party denies liability or the claim is not settled within 90 days, the claimant may proceed against the responsible party in court or present the claim to the Fund. *See id.* § 2713(c). In some enumerated instances, claims may be presented directly to the Fund without first presenting them to the responsible party. *See id.* § 2713(b). "The purpose of the claim presentation procedure is to promote settlement and avoid litigation." *Johnson* v. *Colonial Pipeline Co.*, 830 F. Supp. 309, 310 (E.D. Va. 1993).

In contrast, Rule F(3) promptly "forces all claimants into litigation against the vessel owner." *Ibid.* "In view of these inconsistencies, we conclude that Rule F concursus even if independent of the Limitation Act is inapplicable to OPA claims." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is unwarranted.

1. When the provisions of two statutes are irreconcilable, the latter statute impliedly repeals the

earlier one to the extent of the conflict. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976). The two statutes under discussion here orient the course of litigation in different directions. The Limitation Act, enacted 148 years ago, was designed to encourage the fledgling ship building and shipping industries. See *Hartford Accident & Indem. Co.* v. *Southern Pac. Co.*, 273 U.S. 207, 214 (1927). It accordingly limits the liability of shipowners in certain circumstances. The OPA was designed to assure that, with respect to a particular species of marine accident, cleanup would be prompt and liability would be independent of any liability of the owners and operators under the Limitation Act.

The scheme of the OPA thus conflicts with the Limitation Act with respect to oil spills. The statute begins by providing that the OPA applies "[n]otwithstanding any other provision or rule of law." 33 U.S.C. 2702(a). And, "[e]xcept as otherwise provided," the OPA expressly reserves the applicability of the Limitation Act for general maritime law claims, such as personal injury claims, arising from an oil spill. 33 U.S.C. 2751(e). Those phrases manifest Congress's intent for the OPA to displace any conflicting earlier laws with respect to liabilities created under the OPA. The court of appeals meticulously compared the requirements of the OPA and the Limitation Act and applied the correct legal standard to determine whether the Limitations Act had any further role in cases cognizable under the OPA. Its conclusion that the OPA supersedes the Limitation Act for suits to recover oil spill cleanup and oil spill damages is consistent with the decisions of other courts that compare the Limitation Act to other subsequently

enacted statutes.[3] The OPA "completely supersedes the 1851 statute with respect to oil pollution." S. Rep. No. 94, 101st Cong., 1st Sess. 14 (1989).

2. Moreover, petitioners offer no basis for further review of the court of appeals' holding with respect to the Limitation Act. Although the petition formally presents an issue regarding the displacement of the Limitation Act (Pet. i, question 2), the petition does not identify any specific Limitation Act provision, rendered inapplicable in this dispute by the court of appeals' decision, that petitioners wish to reinstate and have applied to this proceeding. Petitioners, in fact, expressly concede that the OPA controls with respect to the parties who are liable and the extent of their liability. Pet. 4-5.

3. With respect to petitioners' effort to seek relief specifically in the concursus process of Rule F(3) (see Pet i, question 1), the court of appeals correctly concluded that Rule F concursus is inconsistent with the comprehensive recovery scheme under the OPA. Congress enacted the OPA largely to provide claimants who incur removal costs or damages with appropriate avenues of recovery following an oil spill, including a claims procedure. A claimant must first present his claim to the responsible party and, if the responsible party refuses to pay or the claim is not resolved in 90 days, the claimant may proceed with an administrative adjudication of the claim by the NPFC for payment from the OSLTF. 33 U.S.C. 2713. This

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[3] The courts of appeals have reached similar conclusions on the interplay between the Limitation Act and the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981), and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.*, *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991).

process of claims adjudication is intended to avoid having claimants litigate to recover their damages. Under the OPA, the United States obtains subrogation rights for the claims paid by the NPFC. 33 U.S.C. 2715. That process promotes fairly prompt and efficient payment of claims, and claimants need not become embroiled in litigation.

The filing of a Limitation Act proceeding has the opposite effect and is similar to a proceeding in bankruptcy: the vessel owner or operator puts forth its interest in the vessel and pending freight as security, and the district court issues monition and injunction orders to force claimants to litigate the right to that limited fund, by requiring that they make appearances to answer the limitation complaint and file their claims. As the court of appeals observed (Pet. App. A12-A13), imposing the concursus process here would impermissibly convert the government's statutory subrogation right under the OPA into a matter of district court discretion. Even if the court consistently exercised its discretion to enlarge the monition period, the government's collection effort in many cases could be prejudiced in a manner inconsistent with the provisions of the OPA. See *ibid.*

4. Petitioners can point to no conflict with a decision of any other court of appeals.[4] Absent a conflict, the question of whether admiralty concursus procedure should be available to shipowners in oil pollution cases does not warrant this Court's review. To a

[4] The issue of whether concursus applies to OPA claims for removal costs and damages has been presented in two recent appeals: *In re Complaint of Odin Marine Corporation*, No. 97-6266 (2d Cir.), appeal dismissed, May 20, 1998; *In re Complaint of Bouchard Transportation Company*, No. 96-3494 (11th Cir.), appeal pending.

large extent, parties in OPA cases can reduce the litigation burdens by invoking the procedures generally available to litigants in the federal court system: consolidation under Federal Rule of Civil Procedure 42; transfer for *forum non conveniens* under 28 U.S.C. 1404(a); and multidistrict litigation under 28 U.S.C. 1407. To the extent that those procedures will not match the efficiency or convenience of a concursus from the defendant's perspective, that result is dictated by the expanded venue, liability, and deadline provisions of the OPA. In this particular case, the filing of the petitioners' Limitation Act action, and the subsequent monition notices, triggered the filing of protective claims in the district court. Petitioners have not explained why the practical benefits of concursus have not already been achieved in those consolidated proceedings.[5]

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[5] Recognizing, perhaps, that they do not present conventional grounds for certiorari, petitioners aver that the proceedings below have "departed from the accepted and usual course of judicial proceedings." Pet. 3 (citing Sup. Ct. R. 10). The record does not support that assertion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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